No. 15219

United States Court of Appeals

For the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; and EDWARD R. ESTER and LORRAINE M. ESTER His Wife, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

PETITION FOR REHEARING

By Barnett, Owens and Ester

VERNON W. TOWNE
ARTHUR G. BARNETT
ALEC DUFF
Attorneys for Appellants.

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Seattle 1, Washington.

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Come now the appellants, Barnett, Owens and Ester, and respectfully petition this court for a rehearing of the above-entitled matter in which the court entered its opinion on Oct. 20, 1957.

GROUNDS

The order of a new trial for the ascertainment of damages, if any, accruing to the plaintiff as ground rent because of trespass, or on the theory of implied contract to pay rent, by these appellants (opinion of the circuit court page 7, last paragraph), is a mistake apparent on the face of the opinion:

(1) Because the circuit court stated on page 4 of its

opinion that the plaintiff had not proved payment of just compensation which it was obligated to pay to entitle it to continued exclusive possession of the tracts in question; and

(2) Because the trial court abandoned its finding of liability to the government based on its right to exclusive possession (Findings Oct. 21, 1955, R. 63-64; Findings XII to XV, R. 70-73) and on April 26, 1956, entered supplementary findings substituting a different ground of liability, namely, money damages in lieu of specific performance, and reciting the court's view of equity (R. 107-113).

Counsel respectfully submit that there is a contradiction in the appellate court's opinion which states, at one point (page 4), that the plaintiff had not paid the just compensation to entitle it to exclusive use, and, at another point (page 7), that the plaintiff had exclusive use.

ARGUMENT[1]

A. The trial court had already adjudicated the issues of plaintiff's claim to exclusive possession

It is submitted that the trial court's abandonment of the finding of liability based on the plaintiff's failure to prove the allegations of right to exclusive possession (as alleged in paragraph VIII of its complaint,

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[1] Some of the following arguments are in the briefs of these joint appellants but are herein emphasized in the light of the appellate court's opinion. See Br. of Barnett, et al: p. 7(b); 1 and 11, pp. 14-15; p. 22 citations; p. 28; Reply Br. p. 16 citing *U.S. v. Gen. Motors*, 323 U.S. 373, 376, ftn. 4 at 377 on paying compensation for the right to renew; pp. 22, 24, 25 and D. p. 27.

R. 8)[2] is controlling. The plaintiff's claim of exclusive possession had already been adjudicated and denied. Confusion arises from the two sets of findings. But the confusion exists only because of the trial court's attempt to exercise equity in supplemental finding III (R. 108) wherein the plaintiff's *claims* were merely recited. This finding does not disturb the finality of the two preceding supplemental findings I and II (R. 107-108) which pinpoint the plaintiff's absolute failure to prove its title! The appellate court, we feel, has misapplied the October, 1955, findings, thus allowing the plaintiff another chance to do what the trial court expressly found it failed to do.

Query: Where the condemnor has not paid the owner just compensation, can the owner be made liable to the condemnor for trespass, or on the theory of implied contract to pay rent?

The circuit court in its opinion on page 2 stated:

> "The facts which must be considered in passing upon these and other questions are established by the unchallenged findings and supplemental findings of fact."

This court, therefore, found that the plaintiff had not paid the just compensation to entitle it to continued exclusive possession of the tracts in question, and the plaintiff had not fully sustained its burden of proving its right to the continued exclusive possession of the land in question, as alleged in its complaint.

---

[2]Paragraph VIII (R. 8) of the government's complaint alleged "that the plaintiff, the United States of America, at all times herein mentioned, had and does now have exclusive use of said real property upon which said temporary dwellings are presently located . . ."

Supplemental Finding I states:

> "That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the land upon which the building, furniture, furnishings, equipment and appurtenances involved herein have *at all times material to this action* been and are now located." (Emphasis added, R. 107-108)

Thereafter, the trial court entered its finding that the plaintiff had not sustained that burden and had not proved payment of the future ascertainable installments (Finding II, R. 108).

There can be no question that these appellants were the owners of the tracts underlying their respective buildings since the unchallenged findings and supplemental findings of fact establish that fact.[3]

B. Error arises from confusion in reading findings of Oct., 1955, and supplemental findings of April, 1956

Finding XII, Oct., 1955 (R. 70) recites that the lands were taken under original condemnation, under which the plaintiff was granted a right annually to re-

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[3] 1. Finding XI (R. 68) states: "That the owners of each of said buildings and real properties upon which each is situated are as follows: "c." described the land owned by Barnett & Owens (R. 69); "d." described the land owned by Ester (R. 70).

2. Finding XII (R. 70-71) is that the appellants acquired their respective interests in the lands after the date of the contract to remove the buildings.

3. Findings XIII and XIV show that Barnett and Owens and Ester acquired the lands (R. 71-72).

4. ". . . the said defendants being the owners of the real estate involved in this action and identified in Paragraph XI of the findings of fact . . ." (R. 107, introduction).

5. The interest of the plaintiff is recognized as only a claim by the trial court which states, "That the present and only estate in the land here in question *now claimed* . . ." (Supplemental Finding III, R. 108. Emphasis added).

new its exclusive use and that the government had filed timely notice yearly of its intention to renew said exclusive use, the current use extending to Feb. 21, 1956. *The supplemental findings I and II (R. 107-108) of April, 1956, completely amended this latter portion of original finding XII and established the unchallenged fact that the plaintiff had not proved payment of just compensation at all times material to this action* and that it did not have the right to exclusive *possession*. Consequently it follows that, if at all times material the government had not paid its compensation, its attempts to renew exclusive use are futile. It is respectfully suggested that it is the renewal portion of Finding XII which has misled the appellate court into making footnote 3, page 2, of its opinion, stating "The government subsequently terminated its use as of June 30, 1956."

Not having proved payment of decreed just compensation for the right to renew the annual term (or for any term material to the action) the plaintiff had nothing to terminate. *U.S. v. General Motors,* 323 U.S., 373. 376, ftn. 3 at 377.

The circuit court was compelled to obtain its facts by references back and forth between the original findings of Oct. 21, 1955 (R. 62-74) and the supplemental findings of April 26, 1956 (R. 107-111). Supplemental finding VII (R. 110) stated:

> "that the Findings of fact and Conclusions of Law entered Oct. 20, 1955, are reaffirmed in their entirety except that they are modified only as to the specific details enumerated herein."

The error which now concerns these appellants creeps

in at the circuit court opinion, page 2, paragraph 3, where it is stated:

> "Under the terms of the judgments fixing compensation in the condemnation acts, the United States was given the option to renew its exclusive use from year to year, not to exceed three years after the termination of the national emergency. The government filed timely notice, yearly, of its intention to renew its exclusive use, extending to February 21, 1957."

This appears to come from the Oct., 1955, findings II (R. 63) and XII (R. 70). But the trial court in its introduction to the April, 1956, supplemental findings of fact and conclusion of law states:

> ". . . from a preponderance of the evidence, by way of supplement and amendment of the Findings of Fact and Conclusions of Law heretofore entered herein on Oct. 20, 1955, makes the following supplemental and amendatory: Findings of Fact." (R. 107)

Thus original findings II and XII were amended by the clear supplemental findings I and II (R. 107-108) that just compensation had not been paid; therefore, the plaintiff could not have held continuous exclusive use of the land "at all times material to this action" (supplemental Finding I, R. 107-108); nor could the plaintiff have renewed for the applicable periods in the action since by the supplemental findings I and II (R. 107-108) the trial court plainly found "That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the land . . ." and "That the plaintiff has not fully sustained that burden . . . the plaintiff has not proved that the future ascertain-

able installments of such just compensation have been paid . . ." and that the court cannot find such payment and that "This finding is based upon the necessity of the plaintiff establishing in this action, its exclusive right of possession of said real estate."

There can be no question that the plaintiff failed in its necessary proof; that it did not have exclusive possession; that it did not pay just compensation; that it therefore had no renewal right.

Supplemental Finding III (R. 108) could also have misled the court inasmuch as the contents thereof are not findings but merely a recitation of the trial court's reasons for substituting monetary relief. The trial court had already made a finding that the plaintiff had failed in its proof. The trial court was still seeking a way to make these appellants liable on the contract. The trial court was not in this finding attempting to recognize any present interest, other than a mere claim, to the tracts belonging to these appellants as owners. The appellate court, in its opinion, page 5, last paragraph, recognizes the trial court's reasoning process based on the failure of the plaintiff to prove its continued right to exclusive possession.

C. A further explanation

In Supplemental Finding of Fact II (R. 108) is the statement that:

> ". . . the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid . . ."

In using that language, after having already found

that the plaintiff had not shown its right to exclusive possession "at all times material to this action," the trial court was referring to the "future ascertainable installments of just compensation" required by the amended decree of condemnation in the form of annual rents payable *at all times material to this action.*

Originally, in the condemnation proceeding under which the plaintiff took a leasehold interest in the properties, with an option to renew the term from year to year, there was to be paid a fixed amount each year. The original condemnation judgment was amended frequently. The amended judgments were based on stipulations between plaintiff and the owners of the lands involved. These amended judgments provided for the payment of an annual rental, which was a stated sum of money, together with an amount equal to the real estate taxes (See Exs. A-32, A-30, A-34, A-35, A-36, some of the amended judgments for the properties of Barnett, Owens and Ester).

When the trial court entered its Supplemental Findings of Fact and Conclusions of Law, it was referring to "future ascertainable installments of such just compensation" provided for in the amended condemnation judgment. This becomes clear when reference is made to the original documents (R. 126) filed herein:

Document 120, affidavit of Arthur G. Barnett, filed 4/12/56;

Document 121, affidavit of F. N. Cushman for United States in opposition to Motion of Defendant Barnett, filed 4/19/56;

Document 122, Second Supplemental Trial Memorandum of Plaintiff, filed 4/19/56;

Document 124, Supplemental Trial Memorandum of defendants Barnett and Owens, filed 4/20/56; referring to the then required payments of annual rental which included real estate taxes. Inasmuch as real estate taxes under Washington law (RCW 84.60.020) become a lien from and after the 1st day of January, the point the court was making was that the taxes were "ascertainable" prior to February 21 of each year, which was the renewal day of the leasehold terms under the condemnation judgment.

The amount of the compensation to be paid by the plaintiff, which included the real estate taxes for 1954, could not be "ascertained" in 1950, for example. But the amount was ascertainable after January 1st of any year, and prior to February 21st, when a new term began. So, when the trial court spoke of "future ascertainable installments of such just compensation," it was referring to the amount awarded under the amended judgment of condemnation which included real estate taxes for the year of the new term beginning on February 21st.

With this in mind, the Supplemental Findings of Fact become clear (R. 107, 108).

> "That it was incumbent upon the plaintiff herein to prove its exclusive right of possession . . . at all times material to this action.
>
> "That the plaintiff has not fully sustained that burden in that, although the judgment on the declaration of taking and the judgments awarding just compensation were valid, the plaintiff *has not* proved that the future ascertainable installments of such just compensation have been paid . . ." (Emphasis added)

In other words, the plaintiff had failed to prove paragraph VIII of the complaint wherein it alleged "that the plaintiff, . . . at all times herein mentioned, had and does now have exclusive use of said real property . . ." (R. 8) (Br. of Barnett, Owens and Ester, p. 29). The trial court having found that plaintiff had not proved this allegation could not have allowed ground rent for trespass or implied a contract for rent against the owner of the land, so, instead, the court decided on damages in lieu of specific performance.

The plaintiff did not seek a new trial. The government was the first to file its appeal from the decision of the trial court but, on its own motion, dismissed its own appeal. Where there is a failure of proof in the lower court as to the plaintiffs' title, should it be allowed to reopen for the giving of proof in the same action wherein it failed? It did not furnish the proof when requested by the lower court during a two weeks' continuance granted immediately prior to the entering of the supplemental findings of fact (documents 121, 122 by the U.S.; documents 120 by Arthur G. Barnett and 124 by Barnett and Owens). The plaintiff failed to prove the allegations of paragraph VIII of its complaint (R. 8).

CONCLUSION

It is submitted that, under the unchallenged findings of the trial court, the plaintiff failed to prove its right to the exclusive possession of the real estate at all times material to this action, and that, as a result, there is and can be no liability on the part of these appellants for damages for trespass or on the theory of an implied contract to pay rent.

Respectfully submitted,

VERNON W. TOWNE
ARTHUR G. BARNETT
ALEC DUFF
Attorneys for Appellants.

CERTIFICATE

Come now VERNON W. TOWNE and ARTHUR G. BARNETT, attorneys for joint appellants Arthur G. Barnett and Donald F. Owens, and Edward R. Ester, and their respective wives, and do hereby certify that in our combined judgment the petition for rehearing by these appellants is well founded and that it is not interposed for delay.

Dated this 30th day of November, 1957.

VERNON W. TOWNE
ARTHUR G. BARNETT
Of Counsel for the
Above Joint Appellants.